

Home Office Equal Marriage Consultation

Formal critique of the Church of England's submission (11 June 2012)

This Formal Critique was prepared at the National Secular Society's request by Dr. Ronan McCrea Ph.D., M.Sc., LL.B., Barrister and Lecturer in Law at University College London, Academic Fellow of the Honourable Society of the Inner Temple, who litigates cases in areas related to his expertise before the European Court of Human Rights, and is author of "Religion and the Public Order of the European Union".

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1. The distinctiveness of religious and civil marriage

The Church of England's response to the Government's consultation¹ states that "the consultation paper wrongly implies that there are two categories of marriage – civil and religious" and that "In law, there is one social institution called marriage which can be entered into through either a religious or civil ceremony".

The National Secular Society notes, in response, that there is a legal institution called marriage which can be entered into either through a civil or, in certain circumstances, through a religious ceremony. This does not mean that the legal definition of marriage and religious definition of marriage must be the same for all purposes. Since the introduction of civil marriage in the Marriage Act (England and Wales) 1836, the law has envisaged the possibility that individuals who are not married in the eyes of the Church may be married in the eyes of the law. Divorced individuals who subsequently marry for a second time while their former spouse is still alive, are, for example, married in the eyes of the law and the State but not in the eyes of the Roman Catholic Church. The solemnisation of non-Christian and non-Jewish religious marriages is not recognised by the State, so in these cases generally both religious and State ceremonies are held. Quite properly, the State maintains its own definition of marriage and leaves religions to define marriage for their own purposes. The fact that, in some circumstances, it accords religious organisations the right to marry couples for both legal and religious purposes does not mean that the religious definition of marriage must always mirror the legal definition.

By failing to distinguish between social, religious and legal institutions of marriage, the Church of England response confuses the issues at hand. The legal definition of marriage is an important element of the social institution of marriage but the two are not interchangeable. Polygamous couples that are married in the eyes of their faith may be regarded as married by many in their community and social circle, but will not be seen as married in the eyes of the law. Similarly, divorced Roman Catholics in second marriages will be regarded as married to each other by the law, but will not be seen as married to each other by many in their religious community.

It will undoubtedly be the case that the legal recognition of same sex marriage will increase social recognition of the relationships of same sex couples as equivalent to those of married heterosexual couples as well as broader social acceptance of homosexuality. This may be a social development that the hierarchy of the Church of England will regret, but that provides no grounds for asserting that the religious institution of marriage, as defined by the Church of England for its members, will be affected by the Government's proposal to legalise same sex marriage.

2. Performance of Same Sex Marriages by Religious Bodies

The Church of England's claim that a challenge to the prohibition on religious bodies performing same sex marriages may be successfully challenged in the European Court of Human Rights provides no reasons not to proceed with the legalisation of same sex marriage. Any successful court challenge would apply only to those denominations that wished to carry out same sex marriages. As an organisation opposed to same sex marriage, the Church of England would be unaffected.

¹ <http://www.churchofengland.org/media/1475149/s-s%20marriage.pdf>

The National Secular Society is of the view that when the State allows religious bodies to register marriages, a sincere commitment to religious freedom requires those religious bodies that wish to carry out same sex marriages to be able to do so.

Religious freedom and, the Society adds, the principles of secularism, dictate that religious bodies that do not wish to conduct same sex marriages should not be forced to do so. The Church of England fails to provide any evidence that they are likely to be forced to carry out such marriages by the European Court. The European Court has consistently recognised that the freedom of religion protected by Article 9 applies equally to state churches as to other religious organisations (see *Knudsen v Norway* (1986) EHRR 45). English law has also recognised religious conscience in the context of the State Church and marriage by providing in Section 8 of the Matrimonial Causes Act (England and Wales) 1965, that Church of England clergy are permitted to refuse to solemnise the marriage of a divorcee whose former spouse is still alive.

Even taken at its highest, the Church of England's assertion that the possible future lifting of the prohibition on religious same-sex weddings means that "further legislative provision" would be required "to protect the Church of England and other religious bodies" merely means that the Church's position can be protected by minor amendments to the legislation, which, given the Government's assurances repeated by a Minister to Parliament², it seems inconceivable that it would not undertake to table. This is therefore not a reason to abandon the entire project of legalising same-sex marriage.

3. Same Sex Marriage and Establishment:

The establishment of the Church of England has been defended on grounds of tradition and on the basis that it causes no real harm to individuals of other faiths or no faith. The National Secular Society does not believe legalisation of same sex marriage is inconsistent with the established status of the Church of England.

However, if it is the case, as asserted by the Church of England's response to the consultation, that establishment is inconsistent with the legalisation of same-sex marriage, then the burden placed on individuals who are not part of the Church of England or who do not wish to follow its teachings is considerably greater than previously realised. If establishment functions to prevent the enactment of particular laws in contentious areas of social policy, then it becomes indefensible on democratic grounds.

Keith Porteous Wood
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² Given by Equalities Minister Lynn Featherstone 18 Jun 2012: Column 645W "No religious organisation will be forced to host ceremonies for same-sex couples as a result of these proposals."
<http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120621/text/120621w0002.htm#12062169000168>